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ALEXANDER L. STEVAS,

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THE STATE OF TEXAS,
Petitioner

v.

DANIEL P. SAMUDIO,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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QUESTIONS PRESENTED

I.

DOES THE STATE HAVE A CONSTITUTIONAL BURDEN OF SHOWING A DEFENDANT'S WAIVER OF JURY TRIAL IN A MISDEMEANOR?

II.

DOES A MISDEMEANOR TRIAL COURT HAVE A CONSTITUTIONAL DUTY TO ESTABLISH THAT A DEFENDANT WHO IS REPRESENTED BY COUNSEL HAS VOLUNTARILY WAIVED TRIAL BY JURY?

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Petitioner respectfully requests that a writ of certiorari issue to review the decision and judgment of the Court of Criminal Appeals of Texas in the case of The State of Texas v. Daniel P. Samudio, number 546-82 in the court below, which reversed Respondent's conviction for assault.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas in this cause, No. 546-82 on the docket of that court, is reproduced in the Appendix "A". The opinion is not yet commercially reported. The opinion of the Court of

Appeals for the First Supreme Judicial District of Texas appears at 635 S.W.2d 183, and a copy thereof appears in Appendix "B" hereto.

JURISDICTION

The Court of Criminal Appeals rendered its decision on the State's petition for discretionary review on February 9, 1983. The Court affirmed the decision of the Court of Appeals for the First Supreme Judicial District of Texas, which had reversed the Respondent's misdemeanor assault conviction. The State timely filed its motion for rehearing, accompanied by a motion for leave to file for rehearing, as required by Texas state appellate rules. The Court of Criminal Appeals denied the motion for leave to file for rehearing on March 16, 1983. Thereupon the State filed a motion to stay issuance of the mandate by the Court of Criminal Appeals. On March 21, 1983 the Court of Criminal Appeals stayed issuance of its mandate for a period of thirty days.

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3), which states in part that "a final judgment by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court . . . by writ of certiorari, . . . where any . . . right . . . is . . . claimed under the Constitution . . . of the United States." The opinion of the Court of Criminal Appeals stated: "Our decision is based on what we perceive to be a fundamental federal constitutional requirement." The Court of Criminal Appeals did not even discuss Texas state constitutional principles. Clearly there was no independent state basis for decision.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment of the United States Constitution, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Proceedings in the Trial Court

On September 23, 1980 the Respondent was charged by information with Class A misdemeanor assault under V.T.C.A., Penal Code, Section 22.01(a)(1). The penalty for a Class A misdemeanor in Texas, according to V.T.C.A., Penal Code, Section 12.21 is:

(1) a fine not to exceed $2,000;

(2) confinement in jail for a term not to exceed one year; or

(3) both such fine and imprisonment.

The Respondent hired counsel to represent him at trial. The docket sheet of County Criminal Court at Law Number One of Harris County, Texas reflects that the Respondent entered a plea of not guilty to the court and was tried by the court on January 20, 1981. The court found the Respondent guilty as charged and assessed punishment of confinement in the Harris County Jail for one year, with no fine. The Respondent filed a motion for new trial, which was subsequently amended, but the motion was overruled. On April 16, the court reformed the Judgment and sentenced the Respondent to six months in jail. The Respondent gave timely notice of appeal to the Court of Appeals for the First Supreme Judicial District of Texas.

II. Appellate Proceedings

The Respondent retained different counsel to represent him on appeal. Appellate counsel timely filed a brief raising several grounds of error, including one ground complaining that the record did not affirmatively reflect that the Respondent waived trial by jury. On May 13, 1982 the Court of Appeals reversed the Respondent's conviction, holding that the appellate record did not show that the Respondent waived trial by jury. The judgment of the trial court, utilizing a form which has been used in thousands of misdemeanor convictions in Harris County,

Texas, did not state that the Respondent waived jury trial. Rather, it said "No jury having been demanded . . ."[1]

The State of Texas timely petitioned the Court of Criminal Appeals of Texas for discretionary review of the decision by the Court of Appeals, and the State's petition was granted on September 15, 1982. On February 9, 1983 the Court of Criminal Appeals affirmed the decision of the Court of Appeals, thereby agreeing that Respondent's conviction should be reversed. The Court of Criminal Appeals held that the Respondent had a right to jury trial in this misdemeanor case as a matter of federal constitutional law, and it held further that the State of Texas had the burden of establishing that the Respondent waived trial by jury.[2]

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF CRIMINAL APPEALS INCORRECTLY HELD THAT THE STATE OF TEXAS HAS A CONSTITUTIONAL BURDEN OF SHOWING A DEFENDANT'S WAIVER OF JURY TRIAL IN A MISDEMEANOR.

The appellate record contains no affirmative indication that the Respondent waived trial by jury, quite possibly

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1. At the time of Respondent's trial, Article 42.01, V.A.C.C.P. (requisites of a judgment) did not require any statement as to a jury waiver. Effective September 1, 1981, Article 42.01, V.A.C.C.P. states that the judgment should reflect "whether the case was tried before a jury or a jury was waived."

2. Although the State had prayed in the alternative for abatement of the appeal so that the record could be more fully developed, the Court of Criminal Appeals declined to abate. This was inconsistent with the policy followed by the Court of Criminal Appeals in *Garcia v. State,* 641 S.W.2d 246 (Tex. Crim. App. 1982).

because at the time of Respondent's trial, Article 42.01, V.A.C.C.P. did not require that the judgment reflect such a waiver. The judgment indicates that no jury was "demanded," but the demand for a jury and the waiver of a right to jury trial are not the same thing. Thus the appellate record must be regarded as "silent" on the question of a jury waiver, and the Court of Criminal Appeals agreed that "in the instant case we have only a silent record before us." The Court of Criminal Appeals held that waiver of trial by jury could not be assumed from a silent record.

If trial by jury in a Class A misdemeanor in Texas is a federal constitutional right—and *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) suggests that it is—then the next question is where the responsibility lies for safeguarding that right. With respect to the specific question of the waiver of the right to jury trial, does the defendant, the State (i.e., the prosecution) or the trial court have the responsibility for assuring that the defendant has made a knowing and intelligent waiver of jury trial?

Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) was the seminal decision on the waiver of the right to counsel. The Court of Criminal Appeals reasoned *by analogy* from the cases dealing with that right in resolving the issue in this cause. In *Johnson v. Zerbst*, 58 S.Ct. at 1023, the Supreme Court stated:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court . . . This protecting duty imposes the serious and weighty responsibility upon the trial

> judge of determining whether there is an intelligent and competent waiver by the accused.

This language makes it clear that the trial court bears the responsibility for assuring a valid waiver of the right to counsel. However, in this cause the Court of Criminal Appeals did *not* hold that it was the trial court's responsibility to assure a valid waiver of trial by jury. Rather, the Court of Criminal Appeals assigned that responsibility to the State, i.e., to the prosecution. Consistency with *Johnson v. Zerbst* dictates that the responsibility for safeguarding the right to a misdemeanor jury trial against an invalid waiver (or no waiver at all) would lie with the trial court, not with the State.

By assigning the State the responsibility of establishing a valid waiver of jury trial, the Court of Criminal Appeals has misconstrued the federal constitutional principles which were the foundation for that court's decision. In turn, however, this raises a more important question: Does the trial court have a duty to establish as a matter of record that the defendant made a knowing and intelligent waiver of trial by jury in a Class A misdemeanor?

II.

A TRIAL COURT HAS NO CONSTITUTIONAL DUTY TO ESTABLISH THAT A DEFENDANT WHO IS REPRESENTED BY COUNSEL IN A MISDEMEANOR CASE HAS VOLUNTARILY WAIVED TRIAL BY JURY.

The Supreme Court has never held specifically that a misdemeanor trial court has the constitutional duty of establishing a voluntary waiver of the right to trial by jury.

History

Trial by jury was initiated as a way of safeguarding an accused against the oppressive power of a King or the arbitrary or partial judgment of a court. In spite of the fact that trial by jury was held in high regard in England, it amounted to a *privilege* rather than a right. The framers of the U.S. Constitution changed that. Trial by jury became a fundamental right "(i)n all criminal prosecutions . . ." *Patton v. U.S.*, 281 U.S. 276, 50 S.Ct. 253, 74 L.Ed. 854 (1930). The Court in *Patton*, supra noted that at common law the accused was not allowed to waive any right intended for his protection. This doctrine stemmed from a fear that no innocent man should be convicted. The rule arose at a time when the accused could not testify in his own behalf, was not allowed counsel in felonies and not furnished counsel in any case, and if found guilty he would be stripped of his rights of inheritance. The punishment would be death or some other grievous punishment which many times would be out of proportion to the severity of the crime.

The court in *Patton* noted, however, that all these conditions had changed due to the humane policy of modern criminal law, and ruled that trial by jury could be waived. Before such waiver could be effective, the consent of government, the sanction of the court and the express and intelligent consent of the accused were necessary. See also History of Jury Trial as set out in *Singer v. U.S.*, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965).

Decision by the Lower Court

Respondent has relied on, and the Texas Court of Criminal Appeals has cited, rulings dealing with the

waiver of the right to counsel and voluntariness of a guilty plea and applied them to the case at bar.

The lower court cites *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938) as standing for the proposition that the high court will indulge every reasonable presumption against a waiver of fundamental rights and will require the State to demonstrate "an intentional relinquishment or abandonment of a known right or privilege". The Texas Court of Criminal Appeals adds that the Supreme Court has held that a knowing and voluntary guilty plea cannot be presumed from a silent record because "inter alia, by entering such a plea the accused waives his right to jury trial." The Texas Court of Criminal Appeals decided "(t)he inescapable conclusion from the foregoing decisions is that the United States Supreme Court applies the same rule to the waiver of the right to trial by jury that it does to the waiver of the right to counsel (*Johnson v. Zerbst,* 304 U.S. 458) in that such a waiver cannot be presumed from a silent record."

The reasoning of the Court of Criminal Appeals makes two facile assumptions about federal constitutional law which are not necessarily correct. First, that Court assumed that the procedural safeguards which are applicable in felony trials are applicable to the same degree in misdemeanor trials. Second that Court assumed that waiver of jury trial is an act with consequences as severe as the entry of a guilty plea or the waiver of the assistance of counsel. These assumptions carry the cited decisions of this Court far beyond their strict legal issues and their original factual contexts.

The Court of Criminal Appeals blurred the crucial distinction between a felony and a misdemeanor. *Johnson*

v. Zerbst was a felony case. In *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 253 (1969), Boykin entered a guilty plea to an offense which carried the death penalty. The State does not suggest that the court should not be required to proceed with great care before an accused waives his fundamental rights in a felony case. There are serious potential consequences in a felony case, including the possibility of long term imprisonment, loss of voting rights, and the attachment of stigma to a convicted felon. Weighed against such potential damage to a defendant, the difficulty created by a court's independent duty to assure that rights are not lightly waived is a small price for society to pay.

However, a misdemeanor trial presents a different balance of interests. Why should the United States Constitution, Amendments Six and Fourteen, be read as requiring a court to establish that an accused intelligently waived jury trial in a Class A misdemeanor, when, under *Baldwin v. New York,* supra, a Class B misdemeanor defendant is not constitutionally entitled to a jury at all? (See V.T.C.A., Penal Code, Section 12.22, which sets a maximum penalty for Class B misdemeanors of confinement in jail for 180 days and a fine of $1000.) The State is not suggesting that jury trials should not be available in Class A misdemeanors. Rather, the question is how solicitous a neutral court must be of a defendant's interests. Must the court take a paternalistic role? Should the court be required to duplicate the advisory role of hired counsel who presumably is well aware of the availability of jury trial? The imposition of such exhaustive responsibilities upon a misdemeanor trial judge is utterly impractical in view of the large number of misdemeanor cases and the relatively insignificant consequences which result from misdemeanor convictions.

Until its about-face in the decision in the case at bar, Texas had always recognized a distinction in the procedural treatment of felonies and misdemeanors. For example, waivers of trial by jury in capital cases are not allowed. Waivers of jury trial for other felonies must be in writing. Article 1.13, V.A.C.C.P. In felony guilty pleas, evidence must be submitted for a plea to be valid. Article 1.15, V.A.C.C.P. In stark contrast, there is no equivalent of Article 1.13, V.A.C.C.P. at the misdemeanor level requiring that waivers of jury trial be in writing and that the State's attorney and the trial court agree to the waiver. In addition, waivers in a misdemeanor case may be oral, and the accused *or his counsel* may waive a jury. Article 27.14, V.A.C.C.P.; *Lamb v. State,* 409 S.W.2d 418 (Tex. Crim. App. 1966). Additionally, a plea of not guilty may be made orally by the accused or by his counsel. Article 27.16, V.A.C.C.P. Regardless of the plea, the attorney's plea must conform with his client's express desire. *Griffin v. State,* 554 S.W.2d 688 (Tex. Crim. App. 1977).

The decision by the Texas Court of Criminal Appeals requiring the State to establish through the trial record a knowing, intelligent and express waiver of jury trial by the accused flies in the face of its own decisions. Assuming that this "knowing, intelligent and express waiver" must be established at a minimum by an admonition of the trial court, *there have not been any admonition requirements even suggested for misdemeanors* where there was a guilty plea. See for example, *Johnson v. State,* 614 S.W.2d 116 (Tex. Crim App. 1981). The misdemeanor courts have been required to show only that the accused voluntarily, knowingly and intelligently waived his rights to counsel. The Honorable Marvin Teague wrote in *Johnson,* supra, at p. 120 fn. 1:

> However commendable it may be for a trial judge to admonish one accused of a misdemeanor offense, as he must where a person is charged with a felony, see Article 26.13 V.A.C.C.P., hereinafter cited as C.C.P., *there is no requirement in Texas law for a trial court to admonish an accused of anything if the offense is classified as a misdemeanor.* The only thing we find in our law in this regard is the fact that an accused person shall be arraigned in a misdemeanor case if the punishment calls for imprisonment, see Article 26.04 C.C.P. As to the admonishment provisions of Article 26.13, C.C.P., these apply only to felony, not misdemeanor offenses.
> (Emphasis added).

The judgment in the case at bar reflects that Respondent was arraigned and that he was represented by counsel. But even if he had not been represented by counsel, the trial court would have been under no duty to admonish him. *Empy v. State,* 571 S.W.2d 526, 529 (Tex. Crim. App. 1978). Judge Teague's opinion in *Johnson,* supra also suggests why the Court of Criminal Appeals' second assumption in this case is not necessarily correct. Why should waiver of jury trial be treated the same as waiver of counsel or entry of a guilty plea?

If the misdemeanor courts, under Texas law, are not required to admonish the accused in a plea of guilty except as to right to counsel, why should they be required to do so as to right to a jury, where he is represented by counsel of choice and he is pleading not guilty? The State recognizes there are practical reasons why a court should exercise greater caution with regard to a waiver of counsel or guilty pleas. As in *Johnson v. Zerbst,* 58 S.Ct. 1019, 1022, the function of counsel is to provide specialized skill and knowledge which a layman should

not be expected to bring to his own defense. A defendant lacking knowledge of criminal law and procedure would, because of that ignorance, fail to appreciate his need for the assistance of counsel. A court should exercise the greatest caution in accepting a waiver of the right to counsel. With regard to acceptance of a guilty plea, the consequences of the act again demand caution by the court. As pointed out in *Boykin v. Alabama,* supra, the entry of a guilty plea nullifies the protective effect of a variety of constitutional rights. 89 S.Ct. at 1712.

The consequences of waiving a jury trial in favor of a trial to the court are far less drastic than the consequences of pleading guilty or waiving the aid of counsel. The choice between jury trial and court trial is primarily a strategic decision for the defense. The Texas legislature apparently recognized that the decision is a matter for the accused and his counsel, as shown by the fact that Article 1.13 V.A.C.C.P. requires the appointment of an attorney for an accused without counsel before the accused may waive jury trial in a felony. Once the strategic choice is made, an accused faces no dire consequences merely because his case is tried to the court. The same evidentiary rules apply, and the accused may benefit from having the facts of his case presented to a fact finder who understands the law better than a jury would. A trial to the court may afford an accused a better opportunity of being acquitted, since a trial judge, accustomed to weighing testimony and determining the credibility of witnesses, would be less likely to convict someone before weighing all the evidence carefully.

No doubt all of the arguments for and against a trial by jury were weighed by the Respondent and his retained attorney. The decision to waive a jury and proceed with

a trial to the court was patently decided in the knowledge that a trial judge would not be inflamed by testimony that Respondent had attempted to stab the complainant in the back (and had stabbed him on the chest instead) in a petty argument which started when someone urinated on or near a van. Respondent and his attorney knew that a jury would be influenced by the fact that he was on probation for possession of heroin at the time of the assault. A jury might have found him guilty of the assault based on the probation, whereas an experienced trial judge could put the probation in its proper perspective.

The case at bar does not involve a situation as in *Baldwin v. New York,* supra, where a statute prohibited a jury trial in misdemeanors even to those who demanded it by written pretrial motions. Indeed, the record in the case at bar is silent, perhaps because the waiver was done orally in court before the court reporter began to take testimony. And, in light of the lack of any requirements of admonishments or approval by the court or State's attorney, is it any wonder that neither the State nor the court sought to put this waiver in the record?

But the requirements of *Baldwin,* supra have been met. Everything in the record is consistent with the fact that the Respondent was given the *opportunity* for a jury trial. Testimony was heard. Both sides presented evidence. Respondent's trial counsel cross-examined witnesses. It is true the record is silent as to whether the accused waived his right to a trial by jury orally. But it hardly seems conceivable that Respondent and his trial counsel sat through the entire proceedings without noticing a jury was absent and without voicing an objection if a jury was desired.

The record is devoid of any objection that Respondent desired a jury trial but was denied an opportunity of one. The matter was not even raised at Respondent's motion for new trial or at the first amended motion for new trial or at the time the court overruled the Respondent's motion for new trial *almost three months after the case was tried.* The sentence reflects that Respondent was asked by the court "whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof." Neither was the issue of waiver of trial by jury raised by a bill of exceptions. The issue appeared for the first time on appeal. Having been guided through the judicial process by counsel at every stage, the "inescapable conclusion" is that Respondent received what he asked for, a waiver of trial by jury in favor of a trial "to the Court."

In 1938, the U.S. Supreme Court, in deciding that a trial by jury could be waived, said in *Patton, supra* that thanks to "the humane policy of modern criminal law", the bar of waiver of rights was no longer necessary because the reasons for it had changed. The court noted that the accused could testify in his own behalf. If he were too poor, he would be provided with an attorney and his witnesses would be summoned and paid for by the State.

Since *Patton,* society has changed considerably. With the advent of television the world has grown smaller. Millions of people, many of them unable to read or write, have daily access to information. It is through television that everyone, regardless of ethnic background or education, has been able to see man walk in space and on the moon. Through television and the numerous programs dealing with lawyers and the law it is incredulous to

believe that anyone in our society does not know that he or she has a right to a trial by jury.

If the lay person is aware of his rights to a greater degree than ever in the history of the world, it is not too much to presume that Respondent and his counsel discussed these rights, and then intelligently waived that right to a trial by jury. The fact that Respondent's trial counsel did not object to the absence of a jury or request a jury is mute testimony of his client's intent. More importantly, and the central issue herein, is that Respondent has never complained that the trial court *did not* admonish him that he had a right to a jury trial.

CONCLUSION

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

NO. 546-82

DANIEL P. SAMUDIO, Appellant

v.

THE STATE OF TEXAS, Appellee

Petition for Discretionary Review from the Court of Appeals, First Supreme Judicial District of Texas (Harris County)

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

Trial was before the court upon appellant's plea of not guilty to assault, a Class A misdemeanor. V.T.C.A. Penal Code, Sec. 22.01(a)(1). After finding appellant guilty, the court assessed punishment at one year, later reduced to six months. The conviction was reversed by the Court of Appeals for the First Supreme Judicial District. We granted the State's petition for discretionary review in order to examine the Court of Appeals' holding that appellant did not waive his right to trial by jury despite his counseled acquiescence to a non-jury proceeding.

As the Court of Appeals correctly observed, a defendant in a misdemeanor case has the same right to a trial by jury as a defendant charged with a felony. *Franklin v. State,* 576 S.W.2d 621. Under Art. 1.13, V.A.C.C.P., a defendant charged with a felony less than capital may waive his right to jury trial, but the waiver must be made in person by the defendant in writing in

open court with the consent of the court and the State. Waiver of jury trial in misdemeanor cases is not governed by statute and does not have to be in writing. Lamb v. State, 409 S.W.2d 418.

Both parties are agreed that the record contains no evidence showing that the appellant, either orally or in writing, expressly waived his right to a jury trial. The judgment contains the form recitation, "No jury having been demanded . . ." and the docket sheet states, "pled not guilty to the Court." Neither of these writings evidences an express waiver by the appellant. The Court of Appeals rejected the State's argument that an oral waiver could be inferred from appellant's participation, without an objection from counsel, in the non-jury proceedings. The State also contended that in the face of a silent record at trial there is a presumption of regularity on appeal, and that appellant had improperly "hidden behind the log" by failing to object to the absence of a jury until the case reached the appellate level.

The Court of Appeals also rejected these arguments and held that as a matter of federal constitutional law the State must establish through the trial record a knowing, intelligent, and express waiver of jury trial by the defendant.

In Duncan v. Louisiana, 391 U.S. 145, the United States Supreme Court concluded that trial by jury in criminal cases is fundamental to the American scheme of justice and thus held that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases involving non-petty offenses, whether the crime charged be labeled a felony or a misdemeanor.

In Baldwin v. New York, 399 U.S. 66, the Supreme Court held that no offense can be deemed petty for purposes of the right to trial by jury where imprisonment for more than six months is authorized. In Texas, Class A misdemeanors are punishable by a fine not to exceed $2,000.00, confinement in jail for a term not to exceed one year, or both. V.T.C.A. Penal Code, Sec. 12.21.

The Supreme Court has also established standards governing waiver of the right to jury trial and other rights essential to a fair trial. Since the Supreme Court has made no distinction between felonies and misdemeanors with respect to the point at which the right to a jury attaches, we see no logical reason to make such a distinction with respect to the standards governing waiver of the right to jury trial.

In the leading case of Patton v. United States, 281 U.S. 276, the Supreme Court stated:

> "Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, *in addition to the express and intelligent consent of the defendant.*" 281 U.S. 276 at 312 (Emphasis added).

It is extremely doubtful that consent of the court and prosecutor remains a federal constitutional prerequisite to effective waiver of jury trial.

In Singer v. United States, 380 U.S. 24, for instance, the defendant challenged the constitutionality of Fed. R.

Crim. Pro. 23(a) which requires the consent of the prosecutor and the court before an accused can waive jury trial.

The Supreme Court cited *Patton,* but rather than holding that the Constitution *required* the rule in question the Court found no constitutional *impediment* to the federal criminal procedure.

The requirement in *Patton* of an express, intelligent waiver on the part of the defendant, however, is still intact. The great majority of state and federal cases discussing waiver of jury trial recognize *Patton* as the leading case on the subject. See, for example, United States v. Baccaro, 489 F.2d 274 (10th Cir.); Taylor v. State, Wyo., 612 P.2d 851; Short v. Commonwealth, Ky., 519 S.W.2d 828; State v. Olivera, Hawaii, 497 P.2d 1360.

While the various state and federal courts considering the matter have developed different guidelines for determining proof of waiver, based partly on differing procedural statutes, insofar as we have researched the decisions of other forums, all are agreed that waiver of jury can never be presumed from a silent record, at least on direct appeal. Johnson v. State, Ga. App., 276 S.E.2d 667; Countess v. State, Md. Ct. App., 408 A.2d 1302; State v. Irving, Kan., 533 P.2d 1225; People v. Bradly, Ill. App., 266 N.E.2d 469.

In Johnson v. Zerbst, 304 U.S. 458, 464, which involved waiver of the right to counsel, the Supreme Court, relying in part on *Patton,* held that to establish such a waiver the State must demonstrate, "an intentional relinquishment or abandonment of a known right or privilege." The Court also noted that courts indulge every

reasonable presumption against waiver of fundamental rights.

In Carnley v. Cochran, 369 U.S. 506, the Supreme Court held that waiver of the right to counsel cannot be presumed from a silent record. Our Court cited *Carnley* and applied it to jailable misdemeanors in Warr v. State, 591 S.W.2d 832.

In Boykin v. Alabama, 395 U.S. 238, the Supreme Court held that a knowing and voluntary guilty plea cannot be presumed from a silent record because, inter alia, by entering such a plea the accused waives his right to jury trial.

The inescapable conclusion from the foregoing decisions is that the United States Supreme Court applies the same rule to the waiver of the right to trial by jury that it does to the waiver of the right to counsel (Johnson v. Zerbst, 304 U.S. 458) in that such waiver cannot be presumed from a silent record. Carney v. Cochran, 369 U.S. 506. See Warr v. State, 591 S.W.2d 832.

The State relies on Buck v. State, 599 S.W.2d 810 where only five jurors remained after both sides exercised their challenges in a misdemeanor case.[1] Both sides agreed in open court, with the defendant being present, that trial would be with five jurors. We held that under these circumstances where the defendant went to trial with a jury of five without making any objection known to the trial court, his action constituted a waiver. Insofar as *Buck* may be in conflict with the holding herein, the decisions of the United States Supreme Court heretofore delineated require that decision be overruled.

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1. See Ballew v. Georgia, 435 U.S. 323, 98 S.Ct. 1029.

In the instant case we have only a silent record before us. The State has failed to meet its constitutional burden of establishing waiver of jury trial.

Our decision is based on what we perceive to be a fundamental federal constitutional requirement.[2]

The judgment of the Court of Appeals is affirmed.

TOM G. DAVIS, Judge

(Delivered February 9, 1983)

EN BANC

2. Under Baldwin v. N.Y., supra, this decision applies to misdemeanors where imprisonment for more than six months is authoried.

APPENDIX B

Damiel SAMUDIO, Appellant,

v.

The STATE of Texas, Appellee.

No. 01-81-0267-CR.

Court of Appeals of Texas,

Houston (1st Dist.).

May 13, 1982.

Before EVANS, C. J., and DOYLE and STILLEY, JJ.

OPINION

EVANS, Chief Justice.

As a result of a fight, during which the complaining witness was stabbed with a knife, the appellant was charged by information with the misdemeanor offense of assault with intent to cause bodily injury. After a trial to the court, the appellant was found guilty, and his punishment was assessed at one year confinement in jail. However, the trial court later reformed the judgment, reducing the appellant's punishment to six months confinement.

In his first two grounds of error, the appellant contends that the trial court erred in proceeding to trial without a jury, asserting under these points that the record does not reflect a waiver of his right to a jury trial.

Except in certain instances not pertinent here, a defendant's right to a trial by jury in a criminal case is a fundamental right guaranteed under the Sixth and Fourteenth Amendments of the United States Constitution. *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491, (1968), reh. den., 392 U.S. 947, 88 S.Ct. 2270, 20 L.Ed.2d 1412. This right is expressly recognized by our Texas Constitution, art. 1 § 15, and in our Texas Code of Criminal Procedure, art. 1.12. A defendant in a misdemeanor case has the same right to a trial by jury as a defendant charged with a felony offense. *Franklin v. State,* 576 S.W.2d 621 (Tex. Cr. App. 1978).

The right to a trial by jury may, however, be waived pursuant to the provisions of art. 1.13, Tex. Code Crim. Pro. Ann., which provides:

> Art. 1.13. Waiver of trial by jury. The defendant in a criminal prosecution for any offense classified as a felony less than capital shall have the right, upon entering a plea, to waive the right of trial by jury, conditioned, however, that such waiver must be made in person by the defendant in writing in open court with the consent and approval of the court, and the attorney representing the State. The consent and approval by the Court shall be entered of record on the minutes of the court, and the consent and approval of the attorney representing the State shall be in writing, signed by him, and filed in the papers of the cause before the defendant enters his plea. Before a defendant who has no attorney can agree to waive the jury, the court must appoint an attorney to represent him.

In a misdemeanor case, the waiver of a jury trial need not be in writing. *United States v. Smith,* 523 F.2d 788

(5th Cir. 1975); *Lamb v. State,* 409 S.W.2d 418 (Tex. Cr. App. 1976). However, mere acquiescence in a non-jury proceeding does not constitute a waiver, and unless the defendant expressly waives the right, the trial must be to a jury even though judgment erroneously recites that the right was waived. *Dillon v. State,* 165 Tex. Cr. R. 217, 305 S.W.2d 956 (1957).

The printed form of judgment used in the case at bar recites that, "no jury having been demanded, trial proceeded before the Court . . . ," and a docket sheet notation also indicates that the trial was to the court. However, the record does not contain any evidence showing that the appellant, either orally or in writing, expressly waived his right to a jury trial.

The State, with commendable candor, admits in its brief that the judgment recitation is not evidence of an express waiver, and that the record is silent as to whether the appellant orally waived his right to a trial by jury. It is the State's position, however, that an oral waiver should be inferred from the fact that the appellant and his trial counsel participated, without objection, in the non-jury proceedings, and made no complaint regarding the non-jury trial until the filing of this appeal. In support of its position, the State cites *Buck v. State,* 599 S.W.2d 810 (Tex. Cr. App. 1980), in which the appellant contended that he had been denied his constitutional and statutory rights to a jury trial because he was tried by a jury of five persons rather than six. In *Buck,* the judgment was affirmed on the rationale that the defendants, having agreed through their attorneys to a trial before a five-person jury, and having participated throughout the trial

without objection, had effectively waived their right to a six-person jury.

The State's argument has been well presented and is quite persuasive. However, the circumstances in the case at bar are distinguishable from those in the *Buck* case upon which the State relies to support its position. In *Buck*, the defendant chose and received a trial by jury, albeit an irregular jury, and the defendant's counsel expressly agreed to the trial before a five-person jury. In the case at bar, the record does not reflect that either the appellant or his counsel expressly agreed to waive a jury trial.

In cases involving the right to counsel, it has been stated that the waiver of fundamental constitutional rights should not be lightly inferred, *Parker v. State,* 545 S.W.2d 151 (Tex. Cr. App. 1977), and that such a waiver will not be presumed from a silent record. *Boykin v. Alabama,* 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Similarly, the right to trial by jury cannot be inferred from mere acquiescence in a non-jury proceeding, *Dillon v. State,* supra, and the record must affirmatively show a knowing and intelligent waiver by the defendant. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

In the case at bar, the record does not affirmatively show that the appellant expressly waived his right to a trial by jury, and the appellant's first and second grounds of error must, therefore, be granted.

In his third ground of error, the appellant contends that the trial court erred in finding him guilty as charged in the information, because the evidence did not show that

the complainant and the witness at trial were the same person, and because the witness testified that he was attacked on a date different from the date alleged in the information.

The information alleged that the appellant intentionally and knowingly caused bodily injury to Eugene Lorenzo, *Jr.*, the complainant, by stabbing him with a knife on or about August 29, 1980. At the trial, the witness testified that his name was Eugene Lorenzo, and that during the early morning hours of August 30, 1980, the appellant stabbed him, and that he made complaint against the appellant because of the stabbing.

Under the evidence in the record, there is no material variance between the name of the person alleged in the information as the complainant and the witness who testified he was the victim of the appellant's wrongful act. *Hardin v. State,* 88 Tex. Cr. R. 495, 227 S.W. 676 (1920); *Adams v. State,* 300 S.W. 78, 108 Tex. Cr. R. 314 (1927). Neither is there a material variance between the date alleged in the information and the date upon which the complaining witness testified the attack occurred. This ground of error is overruled.

The judgment of the trial court is reversed, and the cause is remanded for a new trial.